Supreme Court, U.S.
FILED
SEP 19 2000
CLERK

No. 99-1379

In the

# Supreme Court of the United States

**CIRCUIT CITY STORES, INC.,**

*Petitioner,*

v.

**SAINT CLAIR ADAMS,**

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICUS CURIAE* OF THE NATIONAL WORKRIGHTS INSTITUTE IN SUPPORT OF RESPONDENT SAINT CLAIR ADAMS

LEWIS MALTBY
*Counsel of Record*
NATIONAL WORKRIGHTS INSTITUTE
166 Wall Street
Princeton, NJ 08540
(609) 683-0313

Attorney for *Amicus Curiae*
NATIONAL WORKRIGHTS INSTITUTE

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

22 pp

## TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

INTEREST OF *AMICUS CURIAE* ..... 1

INTRODUCTION ..... 2

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 3

I. Congress' Intent in Enacting the Federal Arbitration Act Was Both to Eliminate Arbitrary Barriers to the Enforcement of Arbitration Agreements and to Improve the Quality of Justice. The Court Should Consider Both of These Congressional Goals in Deciding Whether the FAA Applies to Contracts of Employment ..... 3

II. The Federal Policy in Favor of Arbitration Is a judicial Policy as Well as a Congressional Policy, and the Court must Consider Policy Issues in Reaching its Decision ..... 15

CONCLUSION ..... 17

## TABLE OF AUTHORITIES

***Cases*** PAGE(S)

*Alford v. Dean Witter Reynolds, Inc.*,
939 F.2d 229 (5th Cir. 1991) . . . . . 8

*Bender v. A.G. Edwards & Sons, Inc.*,
971 F.2d 698 (11th Cir. 1994) . . . . . 8

*Bird v. Shearson Lehman American Express*, 926 F.2d 116 (2nd Cir. 1991) . . . . . 8

*Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) . . . . . 16

*Dexter v. Prudential Insurance Company of America*, 1999 U.S. Dist. LEXIS 3141 (Kansas) . . . . . 9-10

*Hooters of America v. Phillips*,
173 F.3d 933 (4th Cir. 1998) . . . . . 8-9

*Hurst v. Prudential Securities Inc.*,
21 F.3d 1113 (9th Cir. 1994) . . . . . 8

*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,
460 U.S. 1 (1982) . . . . . 15-16

*Prima Paint Corp. v. Flood & Conklin Mfg.*,
388 U.S. 395 (1966) . . . . . 15

*Woods v. Saturn Distribution Corp.*,
78 F.3d 424 (9th Cir. 1996) . . . . . 9



***Statutes***

9 U.S.C.A. 10 . . . . . 7

***Other Authorities***

American Arbitration Association, Annual Report 2000 . . . . . 4

Bureau of National Affairs, Personnel Policies Forum Survey No. 125, Policies for Unorganized Employees (Apr. 1979) . . . . . 2

Holden, Michael R., Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law, 80 Cornell L. Rev. 1695 (1995) . . . . . 15

Interview with Robert Meade, Senior Vice President, American Arbitration Association, September 9, 2000 . . . . . 7

Joel Liefer, Recent Developments in Arbitration, Mediation, and Other Alternative Dispute Resolution Techniques (Dec. 1996) http://www.seclaw.com/html . . . . . 11

Margaret A. Jacobs, Required Job-Bias Arbitration Stirs Critics, Wall St. J., June 22, 1994, at B7 . . . . . 11

National Rules for the Resolution of Employment Disputes (effective June 1, 1997), American Arbitration Association . . . . . 6

Orrick, Herrington & Sutcliffe, Summary of California Jury Verdicts Study 1-4 (1995) ..... 11

Private Justice: Employment Arbitration and Civil Rights, Lewis L. Maltby, Columbia Human Rights Law Review, Volume 30, Number 1, Fall 1998 ..... 12-14

Report of the House Judiciary Committee, Report No. 96, 68th Congress, 1st session, January 24, 1924, pages 1-2 ..... 5

Report of the Senate Judiciary Committee, Report No.536, 68th Congress, 1st session, May 14, 1924, page 2 ..... 5

Stuart Bompey, 19 Employment Relations Law Journal 197 (1994) ..... 11

U.S. General Accounting Office, Alternate Dispute Resolution: Employers' Experiences with ADR in the Workplace 2 (1997) ..... 2, 12

U.S. General Accounting Office, Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution 7 (1995) ..... 10



## INTEREST OF *AMICUS CURIAE*

The National Workrights Institute is a not for profit research and advocacy organization focused exclusively on issues of the workplace and employee rights. Prior to becoming an independent organization, the Institute was the National Taskforce on Civil Liberties in the Workplace for the American Civil Liberties Union from 1988-1999.

The Institute has long been a leader in the development of employment disputes arbitration. We believe that arbitration holds the promise of making workplace justice available to workers for the first time in our history, and that the growth of employment arbitration should be encouraged. We also believe that arbitration will only fulfill that promise if it is voluntary and fair. Institute president Lewis Maltby's 1994 article in the New York Law School Journal of Human Rights was the first major publication to advocate this position. Since that time, Maltby served as an active member of the American Bar Association's National Taskforce on Employment Arbitration, which drafted the ADR due process protocol which has become the national standard for arbitral fairness. Maltby also testified before the Dunlop Commission regarding ADR, and served as an advisor to the Commission at the request of Chairman Dunlop. Maltby is a member of the Board of Directors of the American Arbitration Association, and serves as co-chair of its advisory council on employment issues. His most recent publication on ADR in the Columbia Journal of Human Rights has been cited in many judicial opinions and by several parties and amici in this case.[1]

---

[1] The parties have consented to the filing of this brief; this consent has been filed with the Clerk of the Court. No part of

(continued...)

## INTRODUCTION

Arbitration of employment disputes outside the unionized sector has grown at a remarkable rate. Traditionally, this practice was virtually unknown. In 1979, less than 2% of employers used arbitration.[2] By 1997, 19% of non-union employers were using arbitration for employment disputes.[3] Because arbitration is much less expensive than litigation, it has the potential to bring real access to workplace justice to rank and file employees for the first time. However, there has been very little legal protection for the rights of employees, and most employees have little or no bargaining power. The result has been that most employment systems are not fair to employees. Agreements to arbitrate are not voluntary. They are virtually always a condition of employment. And, with rare exceptions, due process is generally lacking. The National Workrights Institute urges the court not to extend the Federal Arbitration Act to employment disputes under these circumstances.

---

[1] (...continued)
the attached brief has been authored by counsel for either party or any other entity. No persons other than the Amicus Curiae, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

[2] Bureau of National Affairs, Personnel Policies Forum Survey No. 125, Policies for Unorganized Employees (Apr. 1979).

[3] U.S. General Accounting Office, Alternate Dispute Resolution: Employers' Experiences with ADR in the Workplace 2 (1997).



## SUMMARY OF ARGUMENT

The federal policy in favor of arbitration is both a Congressional and a judicial policy. Congress' intent in adopting the Federal Arbitration Act was not to increase the use of arbitration for its own sake, but to do so to improve the quality of justice in America. The judicial policy is also rooted in concern for justice. Because employment arbitration is almost never voluntary, and generally fails to provide due process, it would be inconsistent with both Congressional and judicial policy to extend the FAA into employment agreements.

## ARGUMENT

### I. Congress' Intent in Enacting the Federal Arbitration Act was Both to Eliminate Arbitrary Barriers to the Enforcement of Arbitration Agreements and To Improve the Quality of Justice. The Court Should Consider Both of these Congressional Goals in Deciding Whether the FAA Applies to Contracts of Employment.

Whether the Federal Arbitration Act applies to contracts of employment cannot be entirely determined by the statutory text, or even by the legislative history. The Court must also consider the practical consequences of this decision, and how those consequences relate to the underlying purpose of the FAA and the federal policy in favor of arbitration.

If the statutory text is clear and unambiguous, then the analysis need go no further. The plain meaning of the statute controls and no analysis of legislative history is needed. This, however, is not such a case. As the briefs of the parties amply demonstrate, the meaning of the applicable statutory text is anything but clear. In such a case, analyzing the legislative history is essential.

The immediate purpose of Congress when it enacted the FAA was to eliminate the presumption that arbitration was inferior to litigation as a method of dispute resolution, and to place arbitration on an equal footing with court procedures. Congress concluded that the quality of justice in America would be improved if barriers to the use of voluntary arbitration were eliminated.

This policy has proven to be sound with regards to commercial arbitration. Individuals and organizations with disputes to resolve have increasingly turned to arbitration in recent years. For example, the caseload of the American Arbitration Association more than doubled (from 60,808 to 140,188) from 1991-1999.[4] This growth did not take place because people were forced to turn to AAA. It occurred because people who used arbitration generally found it to be a fair and efficient method of resolving complaints.

Most lower federal courts have held that the federal policy in favor of arbitration is so strong that the FAA must be read to apply to employment arbitration. Other parties and amici have engaged in deep analysis of the legislative history to find Congress' intent regarding employment agreements, and the National Workrights Institute has little or nothing to add to the debate on this point.

However, the debate about Congress' specific intent regarding employment contracts should not exclude consideration of Congress' general intent. Congress believed that the administration of justice in the United States would be improved if artificial restrictions upon the use of arbitration were eliminated. Congress was

---

[4] American Arbitration Association, Annual Report 2000.



not in favor of arbitration for its own sake. Arbitration was not an end in itself. Congress encouraged the expanded use of arbitration as a means to achieving the end of improving justice.

Congress' intent to use expanded arbitration, not as an end in itself, but as a means to improve the quality of justice in America can be seen in the Judiciary Committee reports from both the Senate and the House of Representatives. The Senate report, for example, opens with the concern that existing law at that time left the "party aggrieved—without adequate remedy".[5] The report goes on to characterize the existing law holding arbitration agreements unenforceable as "no longer—founded in reason or justice".[6] The report closes by stating that the results of the Arbitration Society of America (now the American Arbitration Association) in resolving disputes between businesses show "not only the great value of voluntary arbitrations but the practical justice in the enforced arbitration of disputes".[7]

The same concern with the effect of arbitration on the quality of justice appears in the report of the House Judiciary Committee. The report refers to the existing judicial rule against arbitration as an "anachronism" and criticizes "the injustice which results from it".[8] The final paragraph of the report refers to the "obvious justice" of eliminating irrational barriers to arbitration.[9]

---

[5] Report of the Senate Judiciary Committee, Report No. 536, 68th Congress, 1st session, May 14, 1924, page 2.

[6] Senate Judiciary Committee Report, supra, page 3.

[7] *Id.* at 3.

[8] Report of the House Judiciary Committee, Report No. 96, 68th Congress, 1st session, January 24, 1924, pages 1-2.

[9] *Id.* at 2.

It is true that these statements are short and come with little explanation. They offer little specific guidance as to what Congress considered justice in the context of arbitration. However, they clearly demonstrate that Congress was concerned about the quality of justice, and enacted the FAA because it believed that expanding the availability of arbitration would produce justice.[10]

Whether justice will actually be advanced by applying the FAA to employment agreements can best be judged by examining the actual state of employment arbitration today.

One critical dimension in assessing the quality of employment arbitration today is whether it is voluntary. Neutral experts, the academic literature, and the dispute resolution industry all agree that arbitration should be freely chosen by both the parties and that arbitration should not be forced upon people who would rather resolve their dispute by other means. The American Arbitration Association, the world's oldest and largest dispute resolution organization, recommends that arbitration be used only when it has been freely chosen by both parties and suggests that using arbitration not be a condition of employment.[11]

---

[10] The significance of the brevity of the statements about improving justice must also be judged by the overall length of the reports. If the reports were long and well developed, the brevity of the remarks about justice could be significant. However, the entire Senate report is only 3½ pages long, and the House report is only 2 pages. When everything in the reports is expressed with such extreme brevity, the fact that Congress' concerns about justice are not developed at length means very little, if anything.

[11] National Rules for the Resolution of Employment Disputes (effective June 1, 1997), American Arbitration Association. The (continued...)



But employment arbitration today is not voluntary. Of the 500 employment arbitration plans administered by the American Arbitration Association, only 2 percent allow the employee to choose whether to use the plan.[12] In the remaining 98%, "agreeing" to use the employer's arbitration system is a condition of employment. Not only do most employers not allow employees to decide whether to arbitrate or litigate after the dispute has arisen (which might create adverse selection issues), they will not even allow employees to make a binding voluntary choice at the time of employment (when all parties would be on an equal footing).

Nor does employment arbitration consistently provide due process. Nothing in the Federal Arbitration Act requires due process. To the contrary, an arbitration decision can only be overturned by the court under four extreme circumstances. These are fraud, partiality or corruption, misconduct by the arbitrator, and the arbitrator exceeding his or her powers.[13] While these are necessary rules, they do not constitute an adequate set of due process protections. Many egregious due process violations would not even arguably require, or even justify, judicial review. For example, if an employer's arbitration rules did not permit the employee to be rep-

---

[11] (...continued)
Association will administer arbitration systems that are a condition of employment where the employer is not willing to follow this recommendation if: a. the arbitration plan conforms to AAA due process rules (based upon the ABA Due Process Protocol)and: b. a condition of employment plan is legal in the applicable jurisdiction.

[12] Interview with Robert Meade, Senior Vice President, American Arbitration Association, September 9, 2000.

[13] 9 U.S.C.A. 10.

resented by counsel, there is no violation of the FAA. There has been no fraud. Nor has the arbitrator failed to be impartial or committed any other misconduct. And the arbitrator has not exceeded his or her authority. The same would be true if the employer's arbitration rules prohibited all discovery, or denied the arbitrator the authority to deny statutorily authorized remedies.

These are not oversights. The FAA was designed to prevent violations of due process by the arbitrator. The act assumes that the parties themselves will create rules for the conduct of the arbitration that are fair to both sides. It makes no effort to establish due process standards for the arbitration agreement which the arbitrator must enforce. This may be a reasonable approach when both parties have equal bargaining power, but it is a due process nightmare when one party has the ability to impose a contract of adhesion.

Nor have the courts created due process standards. The lower federal courts have consistently declined the opportunity to condition the enforceability of arbitration agreements upon compliance with due process standards.[14] In many cases, the court declined to require such standards even when there were substantial due process issues in the case at hand. Only in a handful of cases have courts required due process as a condition of enforcing arbitration agreements. The most noteworthy of these cases is *Hooters of America v. Phillips*,[15] in which the fourth circuit refused to enforce an agree-

---

[14] See, e.g., *Hurst v. Prudential Securities Inc.*, 21 F.3d 1113 (9th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1994); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991); *Bird v. Shearson Lehman American Express*, 926 F.2d 116 (2nd Cir. 1991).

[15] 173 F.3d. 933 (4th Cir. 1998).



ment to arbitrate which was a condition of employment where the arbitrator had to be selected from a list which was created solely by the employer with no limitations on whom it could select. The employer could deliberately create a list composed entirely of individuals with a conflict of interest because they were economically dependent on it without violating the rules of the plan. But even if such decisions were widespread, and they are not, this offers precious little protection of due process. The due process violation in *Hooters* was so outrageous that it is hard to believe that any employer attempted to get away with it. The fact that the court refused to enforce an agreement to arbitrate involving such a kangaroo court gives little, if any, indication that courts will take issue with other due process violations which are not as blatant.

Indeed, in cases where the facts were less egregious, the courts have generally turned a deaf ear to due process violations in arbitration. In *Woods v. Saturn Distribution Corporation*,[16] the plaintiff, a former Saturn dealer whose franchise had been terminated, was obligated by a non-negotiable clause in his franchise agreement to take his dispute regarding termination to Saturn's arbitration system. The arbitration panel in such cases was composed of two Saturn dealers and two Saturn employees. Despite the fact that all four arbitrators had a conflict of interest due to their ongoing economic relationship with Saturn and all four were economically dependent on Saturn, the 9th Circuit found no due process violation.

In *Dexter v. Prudential Insurance Company of America*,[17] the district court of Kansas faced a situation in

---

[16] 78 F.3d 424 (9th Cir. 1996).

[17] 1999 U.S. Dist. LEXIS 3141 (Kansas).

which an arbitrator refused to order the defendant to disclose the sources of the documents it produced in discovery. This severely handicapped the plaintiff's ability to find evidence that might rebut these documents. She was also handicapped in her ability to cross examine witnesses at the hearing because she did not know which documents had been prepared by which witnesses. Worst of all, the failure to disclose prevented her from learning the identities of several defense witnesses prior to the hearing, leading to a trial by surprise. None of these due process issues troubled the court, which denied the motion to vacate the arbitration award.

Not surprisingly, in the absence of legal requirements, employers have not generally provided due process in their employment arbitration systems. When the United States General Accounting Office examined the due process provided by employers it found that the majority did not meet the minimum standards of the American Bar Association's Due Process Protocol for Employment Arbitration.[18] In the words of the GAO, "if expected to conform with all the criteria for fairness recently proposed by the Commission on the Future of Worker-Management Relations, most would not do so."[19]

In addition, it has been established that certain well-known employment arbitration systems have done a very poor job of providing justice. For example, in the security industry's arbitration system (NYSE and

---

[18] U.S. General Accounting Office, Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution 7 (1995).

[19] *Id.* at 15. The criteria proposed by the Commission (created by President Clinton and carried out jointly by the Department of Labor and the Department of Commerce) took its criteria for fairness from the ABA Protocol.



NASD) employees with discrimination claims consistently fare much worse than employees who take their discrimination claims to court. When Orrick, Herrington, and Sutcliffe (a large national firm which represents employers) analyzed cases in which employees took their discrimination claims to California state court or federal court, they found that plaintiffs won in 44% of the cases.[20] But when Stuart Bompey examined discrimination claims in the NASD/NYSE arbitration system, he found that employees prevailed only 17.7% of the time.[21] The disparity in punitive damages appears even greater. Employee-plaintiffs in court received punitive damages in 18% of the cases.[22] There is no comparable data for NYSE/NASD employment cases. But when the security industry system's record for punitive damages in 10,000 investor cases was analyzed, it was learned that punitive damages were issued in only 2.1% of all cases.[23] And when Margaret Jacobs of the Wall Street Journal analyzed the 1000 awards issue by NYSE arbitrators in the first six months of 1994 (including, but not limited to, employment cases), she found that punitive damages had been awarded in less than 1% (.4%) of all cases.[24]

---

[20] Orrick, Herrington & Sutcliffe, Summary of California Jury Verdicts Study 1-4 (1995).

[21] Stuart Bompey, 19 Employment Relations Law Journal 197 (1994).

[22] Orrick, supra, *id.* at 6.

[23] Joel Liefer, Recent Developments in Arbitration, Mediation, and Other Alternative Dispute Resolution Techniques (Dec. 1996) http://www.seclaw.com/html.

[24] Margaret A. Jacobs, Required Job-Bias Arbitration Stirs Critics, WALL ST. J., June 22, 1994, at B7.

It is true that some employers provide excellent due process. The American Arbitration Association, for example, revised its rules for employment arbitration to conform to the Protocol. AAA will not administer an arbitration unless the employer agrees to allow the Association to use these rules. As a result, the approximately 5 million employees covered by AAA plans receive excellent due process. But, while AAA is the largest arbitration provider, it covers only a small fraction of all employer arbitration. Of the approximately 130 million employees in the American workforce, at least 19% are subject to arbitration agreements.[25] Thus, the American Arbitration Association and its due process rules cover only 20% of those employees who are required to arbitrate their employment disputes. The remaining 80%, some 20 million employees, must arbitrate their disputes without due process protection. Indeed, the Circuit City plan itself does not conform to the Protocol by shortening statutes of limitation and limiting statutory remedies.

Many among the parties and amici favoring applying the FAA to employment agreements cite my 1998 article in the Columbia Human Rights Law Review[26] in support of the assertion that private arbitration provides employee-plaintiffs due process equivalent to that provided by the courts. These parties have misunderstood and misconstrued this article.

---

[25] U.S. General Accounting Office, Alternate Dispute Resolution: Employers' Experiences with ADR in the Workplace 2 (1997).

[26] Private Justice: Employment Arbitration and Civil Rights, Lewis L. Maltby, Columbia Human Rights Law Review, Vol. 30, Number 1, Fall 1998.



The article found that, based on the available data, employee plaintiffs fare better in arbitration before the American Arbitration Association than they do in litigation. It represents a significant step forward because it compares the experience of the entire class of employee-plaintiffs in arbitration and litigation, not just the subset of each who survived pretrial motions and received a hearing on the merits. It also advances our collective knowledge of the relative results of arbitration and litigation by comparing not just the percentage of employee-plaintiffs who received an award in each system, but by comparing the percentage of aggregate demand received by the two classes of plaintiffs.

However, this work, like any study, rests on methodological assumptions and is no more accurate than the assumptions on which it rests. The methodology for my study contains several assumptions whose accuracy can be debated. The most important of these stems from the data sets used. The data set for litigation is all employment civil rights cases filed in United States District Court in 1994, according to the Inter-University Consortium for Political and Social Research Database.[27] There appears to be no question that data accurately reflects the results of employment civil rights litigation in general.

The data set for arbitration, however, are the results of arbitrations conducted by the American Arbitration Association in civil rights employment disputes from 1993-1995. AAA has long been regarded as the gold standard for employment fairness. It is almost certain that employees who arbitrate their claim with AAA fare better than the entire universe of employees who arbi-

---

[27] *Id.* at 46.

trate their claims.[28] Drawing conclusions about the results of employment arbitration as a whole from my study is unwarranted. I make no apology for using this data. There is no data set for the results of employee arbitration as a whole, and researchers have no option but to base their work on the best data which is available. But those who conduct research, and those who use it, must be aware of the research's methodological assumptions, and their implications for the reliability of the conclusion.

The second assumption is that the results of cases which reach a decision on the merits mirror the results of all cases, including the cases which are settled. If employee-plaintiffs' success in settling cases in litigation (relative to arbitration) is not the same as their relative success rate in cases which reach a decision on the merits, it would change the conclusion of my study. This was a necessary assumption, since there is no data on settlement results. But the best one can say about this assumption is that it is plausible.

Thus, my study is properly read to conclude that arbitration is not inherently second class justice, and that a fair arbitration system can and has produced results that compare favorably with litigation. The study does not say that arbitration results in general compare favorably with litigation or that arbitrations conducted outside the AAA provide due process. And the evidence from other sources, such as the GAO strongly indicate that other arbitration providers generally do not meet even minimum due process standards.

---

[28] As mentioned in the Statement of Interest, the author is a member of the AAA Board of Directors and co-chair of its national advisory council on employment arbitration.



## II. The Federal Policy in Favor of Arbitration is a judicial Policy as Well as a Congressional Policy, and the Court Must Consider Policy Issues in Reaching its Decision.

The federal policy in favor of arbitration is clearly a Congressional policy. But it is also the policy of the federal judiciary. Many commentators have noted that the Court consistently reads the FAA in a broad and generous manner.[29] Even more important, the Court has embraced an expansive view of arbitration even when it was not compelled to do so by the FAA. For example, in *Prima Paint Corp. v. Flood & Conklin Manufacturing*,[30] the Court held that an arbitration clause is analytically separable from the rest of the contract, rendering the agreement arbitrable even though it was procured by fraud. This result was undoubtedly consistent with Congressional policy favoring arbitration, but it was by no means compelled by the FAA. The Court would clearly have been within its rights to rule that where a contract has been procured by fraud, the entire contract is void. This is the general rule and nothing in the FAA requires a different result. This does not suggest that the Court's decision was wrong. But it does demonstrate that the Court made its own policy judgment in favor of arbitration.

The same is true of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*.[31] The Court in *Cone* held that the district court abused its discretion by ordering a stay in arbitration pending the outcome of state liti-

---

[29] Michael R. Holden, Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law, 80 Cornell L. Rev. 1695 (1995).

[30] 388 U.S. 395 (1966).

[31] 460 U.S. 1 (1982).

gation. The Court did not base this ruling upon the Federal Arbitration Act. The ruling was based on the Court's own rules for deference to pending state procedures established in *Colorado River Water Conservation District v. United States*.[32] Again, the Court ruled in favor of expanding the reach of arbitration on its own initiative and authority in a case where it clearly recognized that its decision was not controlled by the FAA.

This not to say that the judicial policy should overshadow the Congressional policy, merely that there is an independent judicial policy favoring arbitration. To the extent that the Court is establishing its own policy, it must consider policy arguments, most importantly whether expanding the scope of arbitration will improve or reduce the quality of justice.

As described in Section I, employment arbitration today is virtually never voluntary and generally fails to provide due process. Extending the Federal Arbitration Act to employment agreements under these circumstances would not improve our justice system, but make it worse. Judicial policy on arbitration should reject this course.

---

[32] 424 U.S. 800 (1976).



## CONCLUSION

Employment arbitration holds the promise of making workplace justice truly available for the average employee. But it will only fulfill that promise if it is voluntary and fair. Employment arbitration that is a condition of employment and fails to provide due process is not justice. At present, employment arbitration in America is almost never voluntary and it generally fails to provide due process. Extending the Federal Arbitration Act to employment arbitration under these circumstances would violate Congress' intent that arbitration be encouraged where it would increase justice. It would also be an unwise application of judicial policy on arbitration. For the foregoing reasons, the judgment of the Ninth Circuit should be sustained.

Respectfully submitted,

LEWIS MALTBY
*Counsel of Record*
NATIONAL WORKRIGHTS INSTITUTE
166 Wall Street
Princeton, NJ 08540
(609) 683-0313

Attorney for *Amicus Curiae*
NATIONAL WORKRIGHTS INSTITUTE